KRISHNAN & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) March 2, 1965]

[K.L. — Federal Court Criminal Appeal No. 78 of 1964]

Criminal Law and Procedure — Burden of proof — Direction to jury — Defence must be adequately put to jury — Non-direction not misdirection.

In this appeal the convictions were attacked on two grounds: (i) the judge's direction as to the burden of proof which lay on the prosecution was inadequate (ii) the defence was not put, or was not put adequately, to the jury. The judge, in directing on the burden of proof, said: "The burden of proof in any criminal prosecution is from the beginning to the end of the case on the prosecution. In any criminal case it is the duty of the prosecution from the beginning of the case to the end to prove their case beyond reasonable doubt. Now reasonable doubt does not mean any fanciful doubt. It does not mean beyond any shadow of doubt. It means the sort of doubt which would sway you in matters of importance in your own personal everyday affairs. So that the burden of proof is from the beginning of the case to the end on the prosecution to prove their case beyond reasonable doubt. It is no part of the accused persons' duty to prove their innocence."

Held: (1) there is no fault in the judge's direction on the burden of proof;

(2) it is axiomatic that in every criminal case the defence must be adequately put to the jury by the judge in his summing up and if this is not done any conviction must be quashed. There is, however, no particular formula in which this should be done. Nor is it necessary that the whole of the defence evidence should be recited in detail. In the particular circumstances of this case the court was not prepared to say that there was any inadequacy of direction. "Non-direction merely is not misdirection."

Cases referred to:—

(1) *R.* v. *Stoddart* (1909), 2 Cr.App.R. 217, 246.

(2) *R.* v. *Attfield* (1961), 45 Cr.App.R. 309, 312, 313.

FEDERAL COURT.

R. Ponnudurai for the appellants.

Salleh bin Abas (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): These two appellants were convicted at Penang for the murder of a very old man by the name of Souter.

Souter and his wife (who were 80 and 81 years of age respectively) were living alone with a Chinese maid-servant in a large house on the outskirts of Penang. On the night of 28th July, 1964, Mrs. Souter's attention was attracted by noises coming from the bathroom where her husband was preparing to retire for the night, the evidence suggests that he was brushing his teeth. She went to the bathroom and found two men both of whom were armed with parangs and one of whom was in the act of inflicting extremely serious injuries upon her husband whereby he ultimately died.

Mrs. Souter was held by the second man while the first man accomplished his purpose and then under the influence of terror she opened her safe and the two men took a large quantity of jewellery most of which was abandoned by reason of their having to depart precipitously on the arrival of the police who had been called by a neighbour.

The two appellants were in the event convicted for the murder of Souter and against these convictions they have now appealed.

The convictions have been attacked on two grounds, both of which concern the manner in which the case was put by the trial judge to the jury. First it was said that the judge's direction as to the burden of proof which lay on the prosecution was inadequate. Second it was said that the defence was not put, or was not put adequately, to the jury.

With regard to the first of these grounds, what the judge said was this:—

> "The burden of proof in any criminal prosecution is from the beginning to the end of the case on the prosecution. In any criminal case it is the duty of the prosecution from the beginning of the case to the end to prove their case beyond reasonable doubt. Now reasonable doubt does not mean any fanciful doubt. It does not mean beyond any shadow of doubt. It means the sort of doubt which would sway you in matters of importance in your own personal everyday affairs. So that the burden of proof is from the beginning of the case to the end on the prosecution to prove their case beyond reasonable doubt. It is not part of the accused persons' duty to prove their innocence."

We can find no fault with that.

With regard to the second ground of appeal, it is of course axiomatic that in every criminal case the defence must be adequately put to the jury by the judge in his summing-up and if this is not done any conviction must be quashed.

There is, however, no particular formula in which this should be done. Nor is it necessary that the whole of the defence evidence should be recited in detail. Indeed in many cases such a course would not be in the interests of justice, nor indeed in the interest of the accused person.

We would pause here to read the following passage from the old case of *Stoddart* [1] which was repeated by the Court of Criminal Appeal as recently as 1961 in the case of *Attfield*:— [2]

> "'Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice.'
>
> Nothing that this court is saying today is intended to put forward the suggestion that a judge is entitled to refrain from discussing the evidence if the circumstances of the case and the conduct of the trial demand that he should."

Approaching the present case in the light of these observations, it has never been denied that on the night in question, the night of 28th July last, two men entered the Souter house with weapons and these two men were responsible for the murder of Souter. There has never been any suggestion at any time that there was one man or that there were more than two men or that there was anybody at all who was not connected with the murder. The prosecution case was that these two men were the appellants. That was based on the evidence of Mrs. Souter who identified them at the trial and whose evidence was supported by police evidence that she had identified them prior to the trial at identification parades held, in the case of the first appellant, at the police station, and, in the case of the second appellant, at the Penang gaol. In the case of the first appellant there was also evidence that after the murder he had attempted to sell an amethyst ring which had been removed from the Souter house by the murderers.

The defence was that the appellants were not the men in question, that at the material time they were not in the Souter house but were at home. Mrs. Souter's evidence was not to be accepted not because she was an untruthful witness but because her age and infirmity were such that it was unsafe to rely on her powers of observation. The identification parades were improperly conducted. The stolen amethyst ring was never in the possession of the first appellant; he had found a different ring in the highway and had attempted to sell it but that was not the ring that was produced in court.

In support of this both the appellants gave evidence and they called two witnesses whose evidence, however, was of little importance and such as it was related only to the identification parade at the prison and the ring.

Before us there has been little complaint as to the way the judge dealt with the evidence as to the identification parades and the ring and in our view such complaint as there has been is without substance. The evidence was put to the jury and it was left to them to evaluate it.

It was, however, argued that it was not put to the jury that the defence was one of *alibi*. It is true that that was not put in terms. But properly considered the real substance of that defence was put to the jury, and put in a way that was certainly not unfavourable to the appellants. The real point of their defence, and this was their evidence, was not so much that they were at home at the material time, but it was that they were not at the Souter house at the material time. The jury knew that they denied being there, they had heard them say so, but what they had to decide was whether or not they were satisfied they were there and that was fairly put by the judge who devoted a considerable portion of his summing-up to the issue, a portion which has to be read in the light of his observations as to the burden of proof which have already been quoted.

In the particular circumstances of this case we are not prepared to say there was any inadequacy of direction. As was said by Ashworth J. in the case of *Attfield, supra*: "Non-direction merely is not misdirection."

The appeals are dismissed.

Appeals dismissed.

Solicitors: *Rajendra & Teik Ee.*

MOHAMED SAID v. HAJI OMAR

[A.C.J. (MacIntyre J.) March 2, 1965]

[Ipoh — Civil Application No. 1 of 1965]

Practice and Procedure — Failure to file statement of defence — Whether there was negligence — Setting aside judgment and decree of subordinate court.

Subordinate Courts Rules, 1950, O.XIX r. 3(1)(b)(i) — Claim for "liquidated sum".

This was an application in revision against the judgment and decree of a magistrate in a civil action for $460 and costs. The claim was for the balance outstanding in respect of $500 paid by the respondent to one *N.C.* in settlement of a debt owed by the applicant and for the repayment of which the respondent had stood surety. The writ of summons was served on the applicant on August 1, 1964. The applicant failed to file a statement of defence but on August 9, he wrote to the court applying for a postponement of the hearing to September 12 in order to enable him to defend the action by procuring certain papers and information from the High Court regarding a bankruptcy proceeding in which he was adjudged a bankrupt in 1958 and discharged in 1960. He also stated in his letter that the debt in question was in respect of a sum of $135 borrowed by him from one *N.V.C.* and that since he had disclosed the debt in his statement of affairs, he was not liable to pay the amount claimed by virtue of his discharge from bankruptcy. On August, he also addressed a letter to the judge, High Court, through the assistant official assignee, applying for the relevant documents. The assistant official assignee instead of forwarding the letter to the judge, chose to deal with the matter himself and sent a reply to the applicant confirming that the debt owed to *N.V.C.* was disclosed in his statement of affairs. The reply was however silent regarding the request for the supply of relevant documents. The result was that the applicant never got the documents he asked for. He again applied for a further postponement, but the magistrate rejected his application and entered judgment by default in favour of the respondent.

Held: (1) the failure of the applicant to file a statement of defence in this case was not due to negligence or want of diligence and he should be given an opportunity to defend the action;

(2) having regard to all the circumstances of the case and to the law as expounded in *Walmershausen* v. *Gullick* [1] to the effect that the contingent liability of a surety is a debt payable in bankruptcy even though it was not "ascertained at the time of the bankruptcy, nor included in the schedule of liabilities or in the claim of proof", this was a proper case for the High Court to set aside the judgment and decree of the magistrate.